IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4592 OF 1994

Shri Chandrakant Atmaram Lange,
Aged 65, Indian Inhabitant,
residing at 56, Kamatipura,
2nd Lane, Bombay 400 008. ..Petitioner
(Org.Plaintiff & Respondent in Appeal No.51 of 1990.)

Vs.

Champalal Mishrimalji Bhandari,
Room No.16, 2nd Floor, House No.56,
Kamatipura, 2nd Lane,
Bombay - 400 008. ..Respondent
(Org.Defendant Appellant in Appeal No.51 of 1990.)

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Shri R.S.Deshmukh for the petitioner.

Shri Vinod L. Desai for the respondent.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 4th OCTOBER, 2004.

ORAL JUDGMENT:

1. Heard the learned advocates for parties. Perused the records.

2. The petitioner challenges the judgment and order dated 18th March, 1994 passed by the lower appellate Court thereby setting aside the decree of

eviction passed by the trial Court on 27th October, 1989 solely on the ground that the suit having been filed for eviction of the tenant on the ground of default in payment of rent, it had not preceded by a valid notice under Section 12(1) of the Bombay Rents, Hotel and Lodging Rates Control Act, 1947, hereinafter called as "the said Act".

3. Few facts relevant for the decision are that a notice demanding arrears of rent came to be issued to the respondent/tenant on 9th June, 1977 which was stated to have been sent under the registered post as well as under certificate of posting. The notice which was sent under the registered post was returned with postal remarks "left". However, it is the claim of the petitioner that prior to return of the said notice by postal authorities, the petitioner had pasted a copy of the said notice on the door of the suit premises on 13th June, 1977. It is also to be noted that undisputedly the respondent/ tenant was not seen or noticed in the suit premises by the petitioner in the years 1975, 1976 and 1977.

4. The trial Court has held that the notice which was returned with postal remarks "left" amounted to valid service of the notice, secondly that the

materials placed on record also established that the notice was served upon the respondent under certificate of posting and further that the statement of the petitioner that the notice was pasted on the door of the premises was to be believed in the facts and circumstances of the case. The lower appellate Court, however, while setting aside all the three findings on the basis of the statement of the witness of the respondent viz. the brother of the respondent, wherein the witness had stated that he had no knowledge that the postman had come to the suit premises with the registered packet and further that there was no notice pasted on the door of the suit premises on 13th June, 1977, also disbelieved the service of the notice under certificate of posting as there was no postal seal imprint by the postal authorities on the document relating to the under certificate of posting.

5. While challenging the judgment and order, placing reliance in the decisions of this Court in the matter of **Narayan Ganpat Bhoite v. Smt. Rampyari Suchitram Gupta Since deceased through heirs,** reported in 2000(4) ALL MR 713 and **David K.N. v. S.R.Chaubey (Chaturvedi),** reported in 2003(4) Bom.C.R.612 as well as in the decision of Supreme Court in the matter of

M/s.Madan & Co. v. Wazir Jaivir Chand, reported in 1989(1) All India Rent Control Journal 29, it was contended that the lower appellate Court erred in casting the burden of proof upon the petitioner about the service of the notice upon the respondent, ignoring the fact that the respondent had not informed about change in the address of the respondent at any point of time and the notices which were sent by the registered post as well under certificate of posting were sent with the address of the suit premises. Considering the provisions of Section 106 of the Transfer of Property Act, once it was established that the personal service was not possible and the petitioner had proved the fact of pasting of the notice on the suit premises and the trial Court had arrived at the clear findings in that regard in favour of the petitioner on assessment of the evidence on record, there was no justification for interference by the appellate Court in those findings and therefore, the view taken by the appellate Court is totally perverse in that regard. On the other hand, the learned advocate for the respondent placing reliance in the decision of this Court in the matter of **Mulibai Mengraj Shah v. Mangilal Chunilal Parmar,** reported in 1994(2) All India Rent Control Journal 464 submitted that there was no cogent evidence led by the

petitioner about the service of the notice and the findings arrived at by the lower appellate court on assessment of the evidence do not warrant interference in writ jurisdiction and in that regard, attention was also drawn to the decisions of the Apex Court in the matter of **M/s.Hotel Rosalia (P.) Ltd. v M/s.Metro Hotels & Ors.,** reported in (2001) Vol.103(3) Bom.L.R. 1 as also in the matter of **Bathutmal Raichand Oswal v. Laxmibai R. Tarta & Anr.,** reported in (1975) 1 SCC 858.

6. There can hardly be any dispute on the proposition of law that in exercise of powers under Article 227 of the Constitution of India, it is not permissible to interfere with the concurrent findings of fact or even in the findings of fact arrived at by the lower appellate Court differently from those of the trial Court unless the findings are shown to be perverse or totally contrary to the materials on record.

7. In the case in hand, it is not in dispute that the petitioner was fully aware of the fact that the respondent was not available in the suit premises in the years 1975, 1976 and 1977 and yet the notice of demand of arrears of rent was sent on the same address

to the respondent. The contention of the learned advocate for the petitioner, however, is that in the absence of any other address of the respondent being furnished to the petitioner, no fault can be found with the petitioner for having sent the notice of demand on the address of the suit premises and in that regard, attention is drawn to the decision of the Supreme Court in the matter of **Bathumal Raichand Oswal (supra)** as well as of this Court in the matter of **David K.N. (supra).** Undoubtedly, the petitioner is justified in contending that in cases where the landlord is unaware of the whereabouts of the tenant, and the tenant has not furnished any address other than that of the suit premises to the landlord, there is no burden cast upon the landlord to go in search of the whereabouts of the tenant and/or his address, and it will be sufficient for the landlord to send notice on the address of the leased premises. However, in the case in hand, it is an admitted fact that the petitioner had full knowledge about the absence of the respondent in the suit premises for a continuous period of three years prior to the issuance of notice. Being so, though no fault could be found with the petitioner for having sent the notices at the address of the suit premises, it was necessary in such case for the petitioner to establish that the second option

available under Section 106 of the Transfer of Property Act in relation to the service of the notice was duly complied with by the petitioner before proceeding to initiate the suit for eviction against the respondent on the ground of default in payment of rent. It was, therefore, necessary for the petitioner to establish the fact that the notice was duly pasted on the door of the suit premises before initiating the proceedings in the Court.

8. Undoubtedly, the trial Court in this regard has held that the petitioner has established the fact of pasting the notice. However, the said finding is based merely on the testimony of the petitioner himself without there being any evidence in support thereto. Exactly on this aspect, and taking into consideration the denial of the fact of service of notice by pasting the same on the door of the suit premises, the lower appellate Court has observed that "But it is material to note that the respondent has not cared to show or disclose in his evidence in his examination in chief the name of the person who has witnessed it or the person who has allegedly witnessed the pasting of the copy of the demand notice by the respondent, whether that witness is available, whether the respondent is going to examine the said person.

Not only this but no attempt has been made to issue witness summons upon the said alleged witness by the respondent so as to call him and examine him in support of his case of pasting of the copy of the demand notice upon the appeal premises." No fault can be found with these findings nor the same can be said to be perverse, neither the petitioner has established the said findings to be contrary to the materials on record. The service of notice under Section 12(2) of the said Act prior to initiation of the eviction proceedings on the ground of default in payment of rent being mandatory, the factum of service of such notice obviously relates to the jurisdictional fact which empowers the Court to take cognizance of such proceedings, it is absolutely necessary for the landlord in such proceedings to plead and prove the said fact with cogent evidence. Mere statement of pasting of notice by the landlord cannot amount to proof of pasting of such notice. Such statement needs to be corroborated by producing convincing evidence in that regard. In the case in hand, it is apparent that the petitioner had utterly failed to establish the claim about the pasting of demand notice on the suit premises prior to initiation of the proceedings for eviction against the respondent. The finding in that regard arrived at by the lower appellate Court is

clearly borne out from the records and does not warrant any interference in writ jurisdiction.

9. In the facts and circumstances of the case, therefore, it is not necessary for this Court to refer to the various decisions sought to be relied upon by the learned advocates for the parties. Suffice to refer to the following observations of the Apex Court in **Madan's case (supra)** wherein:-

> "It is suggested that a landlord, knowing that the tenant is away from station for some reasons, could go through the motions of posting a letter to him which he knows will not be served. Such a possibility cannot be excluded."

Undoubtedly, all the observations of the Apex Court as regards the obligation of a tenant to furnish his address, in case of his absence at the lease premises as also the other observation regarding the burden cast upon the tenant to disprove the service, once the landlord establishes the fact that the notice was sent by registered post, are to be considered bearing in mind the fact situation of each case and more particularly when the landlord is aware about the

continuous absence of the tenant at the premises. In such a case, the landlord being fully aware of the fact that the personal service would not be possible, it is necessary for the landlord to establish the fact of pasting of the notice on the suit premises, not only by mere testimony of the landlord himself but by other cogent evidence like the testimony of the witness who had been present at the time of pasting of the notice on the premises or some other evidence which can convincingly establish the fact of pasting of the notice. Undoubtedly, in the case in hand, no such evidence has been led by the petitioner and, therefore, no fault can be found with the findings arrived at by the lower appellate Court and for the same reason, no interference is called for in the impugned judgment. The petition, therefore, fails and is dismissed. Rule is discharge with no order as to costs.